FILE COPY

No. 766

In the Supreme Court of the United States

OCTOBER TERM, 1942

VIRGINIAN HOTEL CORPORATION OF LYNCHBURG,
PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF

W. A. SUTHERLAND,
Amicus Curiae.

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MOTION

Now comes the undersigned and moves for leave to file the annexed brief as amicus curiae. The undersigned is interested in the decision of this case because he is counsel for a taxpayer domiciled in the Fifth Circuit in an identical case now pending in the Board of Tax Appeals; and because he is counsel for another taxpayer domiciled in the Fourth Circuit, whose similar suit in the United States Court of Claims was recently dismissed on an administrative settlement by the Bu-

reau of Internal Revenue, and for whom suit must now be filed for other years if this petition for a writ of certiorari is not granted.

Letters from counsel for the Respondent and from the Solicitor General consenting to the filing of this brief have been filed with the clerk.

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BRIEF AMICUS CURIAE

The Government, in its Brief in Opposition, admits the direct conflict between the decision of the court below and the decision of the Circuit Court of Appeals for the Third Circuit in *Pittsburgh Brewing Co.* v. *Commissioner,* 107 F. (2d) 155 (hereinafter called "the *Pittsburgh* case"), which case involved the same depreciation question here involved. The Government suggests, however, that the authority of the *Pittsburgh* case "has been considerably shaken" by the decision of the same court in the case of *Commissioner* v. *United States and International Securities Corp.,* 130 F. (2d) 894 (hereinafter called "the *United* case"), so that there is not now any conflict between the Third and Fourth Circuits on the issue here involved.

For the following, among other reasons, it would be utterly wrong to consider the decision of the Circuit Court of Appeals for the Third Circuit in the *United* case as indicating any withdrawal from its position in the *Pittsburgh* case:

1. Neither the *Pittsburgh* case, nor the subject of depreciation, is mentioned or suggested in the opinion of the Circuit Court of Appeals for the Third Circuit in the *United* case, which case in no way involved depreciation but involved solely the proper treatment of recoveries of bad debts previously charged off, where no tax benefit was derived from the charge-off.

2. The Circuit Court of Appeals for the Third Circuit in the *United* case, in considering its decision as to the effect of recoveries of debts previously charged off, did not even mention the word "allowed", on which words its decision in the *Pittsburgh* case largely turned.[1] The *United* opinion did not even refer to any

[1] The important portions of the *Pittsburgh* opinion are quoted in the Brief in Support, pp. 13-15.

portion of the law or regulations which contains the word "allowed". It may be that it should have considered the effect of Article 23(k)-1 of Regulations 94, which refers to bad debts, the charge-off of which has been *"allowed"*;[2] but its opinion refers only to Article 42-1,[3] which contains no reference to the word *"allowed"*.

3. The Government now urges that the questions involved in the *Pittsburgh* case and in the *United* case are substantially identical, so that "the two decisions cannot consistently stand together and the later case must be accepted as representing the present views of the court". But in its brief in the *United* case the Government squarely took the position that the decision in the *Pittsburgh* case had no bearing upon the issue before the court in the *United* case. It was there urged (*United* Brief, pp. 18-19):

> "The taxpayer also cites *Pittsburgh Brewing Co.* v. *Commissioner,* 107 F. (2d) 155 (C. C. A. 3rd), in support of its contention that the recovery in 1937 was not taxable, but that case involved a different question and a different statutory provision. There was no question there of a recovery after the deduction of a loss or a bad debt, but a question as to the proper basis for determining depreciation. The statute allows a taxpayer to subtract from the cost of its property depreciation to the extent allowed

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[2] Reg. 94, Art. 23(k)-1. "Any amount subsequently received on account of a bad debt or on account of a part of such debt previously charged off and *allowed* as a deduction for income tax purposes, must be included in gross income for the taxable year in which received." (Italics supplied.)

[3] Reg. 94, Art. 42-1. "Bad debts or accounts charged off subsequent to March 1, 1913, because of the fact that they were determined to be worthless, which are subsequently recovered, whether or not by suit, constitute income for the year in which recovered, regardless of the date when the amounts were charged off. (See article 23(k)-1.)"

but not less than the amount allowable. The taxpayer in that case had reported depreciation on several income tax returns in excess of amounts legally allowable. Thus, when the taxpayer asked to have an adjusted basis computed for later years, it argued that it should not be required to subtract the total amount of these depreciation deductions from its cost price as it had sustained net losses in the earlier years, and so the aggregate of such deductions did not represent depreciation which had been actually allowed. This Court agreed with that contention, holding that under the specific statutory provision involved there, the basis was to be computed by subtracting only depreciation which had been actually offset by taxable income in the year the deduction was taken. Other decisions cited by the taxpayer (Br. 13) also appear to turn on specific statutory provisions and do not involve a question of what constitutes gross income or present facts similar to these here."

In view of the above it is somewhat surprising to find the Government now contending that the two situations are inherently identical.

4. There is a fundamental distinction between the situations presented in the *Pittsburgh* case and the *United* case and the provisions of the law and regulations applicable thereto. In the *Pittsburgh* case the fact is that the depreciation deductions taken in prior years were in excess of those legally allowable; whereas in the *United* case the deduction of the debts in the earlier years was legal and proper.[4] The provision of the law

[4] The court stated in its opinion in the *United* case (130 F. (2d) at p. 897):

"It actually elected to take the losses in 1934 and 1935, and even if it did so as a result of a mistake of fact *there is ample evidence to support the Board's conclusion that the deductions could be taken properly in 1934 and 1935.*" (Italics supplied.)

as to depreciation (in effect only since 1932),[5] providing that basis shall be adjusted for the amount of depreciation "*allowed*", even though in excess of the amount properly "*allowable*", was enacted expressly to remedy a situation where admittedly excessive depreciation had been deducted without legal authority and had resulted in tax benefit, and the taxpayer was thereafter seeking to take advantage of an inconsistent position after the statute of limitations had run against the Government for the earlier years. There is no such contrast between "*allowed*" and "*allowable*" in the bad debt provisions of the regulations. See footnotes 2 and 3, *supra*. These provisions were not aimed primarily, if at all, to cover the situation where items were improperly deducted without legal authority in a prior year and the taxpayer is later seeking to ignore the deduction to the unfair disadvantage of the Government. On the contrary, the provisions with reference to recovery of bad debts were aimed primarily to cover the normal situation where the debts constituted proper deductions in the years of charge-off, but are later recovered. These bad debt regulations have been unchanged since 1921 (Reg. 62, Arts. 52 and 151),[6] at which time the necessity of protecting the Government against inconsistent positions on the part of taxpayers had not yet impressed itself upon any one in authority.

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[5] I. R. C., 113 (b)(1)(B) provides that the basis of property shall be adjusted

> "In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent *allowed* (but not less than the amount *allowable*) under this chapter or prior income tax laws." (Italics supplied.)

[6] There is no reason to discuss in this brief what, if any, change in these regulations was effected by section 116 of the Revenue Act of 1942. That section is fully discussed in the main briefs.

CONCLUSION

There is a direct conflict between the views of the Third and Fourth Circuits on the question involved in the *Pittsburgh* case and the case at bar; the question involved is one of large importance; and it seems clear that a writ of certiorari should be granted.

Respectfully submitted,

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